IN THE
SUPREME COURT of the UNITED STATES
October Term, 1975

No. 75-1699

Mark H. Horodner,

Appellant,

vs.

Arnold R. Fisher as Commissioner of the New York State Department of Motor Vehicles

Louis J. Lefkowitz as Attorney General of the State of New York

Hon. Henry Wenzell III District Attorney of the County of Suffolk of the State of New York,

Appellee.

On Appeal From the Court of Appeals
of the State of New York

MARK H. HORODNER,
Appellant, Pro Se
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Merrick, New York
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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

Mark H. Horodner,

Appellant,

v.

Arnold R. Fisher,
as Commissioner of
Motor Vehicles, et al.,

Appellee.

On Appeal From the Court of Appeals
of the State of New York.

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Memorandum Decision of the Court of Appeals of the State of New York is reported at 38 NY2d 680, and appears herein

as Appendix A. The Appellate Division of the Supreme Court of the State of New York, Second Judical Department wrote no opinion, but the order of affirmance is reported at 363 NYS2d 315, 46 AD2d 887, and is reprinted in Appendix B. The opinion of the Supreme Court of the State of New York County of Suffolk is not officially reported, but is reprinted in Appendix C.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is civil action brought on by the Appellant attacking the constitutionality of Section 510 of the Vehicle and Traffic Law of the State of New York. Section 510 of the Vehicle and Traffic Law of the State of New York provides for Suspensions and revocations of driver's licenses, without providing for a notice and hearing prior to such suspension or revocation. Appellant contended that Section 510 of the Vehicle and Traffic Law of the State of New York is invalid because it is repugnant to the Fourteenth Amendment, Due Process Clause to the Constitution of the United States. The decision of the New York State Court of Appeals was in favor of the validity of Section 510 of the Vehicle and Traffic Law.

(ii) The judgment or decree sought to be reviewed is the decision of the Court of Appeals of the State of New York affirming the constitutionality of Section 510 of the Vehicle and Traffic Law. That decision was issued on February 26, 1976. No petition for rehearing was filed. The Notice of Appeal was filed in the Supreme Court of Suffolk County of the State of New York, the court posessed of the record, on May 11, 1976.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257 (2).

(iv) The validity of Section 510 of the Vehicle and Traffic Law of the State of New York is here involved. The section of this law is as follows:

510. Suspensions, revocation and reissuance of licenses and certificates of registration

2. Mandatory revocations and suspensions. a. Mandatory revocations. Such licenses shall be revoked and such certificates of registrations may be revoked where the holder is convicted:

(iv) of a third subsequent violation, committed within a period of eighteen months, any provision of section eleven hundred eighty of this chapter, any ordin-

ance or regulation limiting the speed of motor vehicles and motorcycles or any provision constituted a misdemeanor by this chapter, not included in subparagraph (i) or (iii) of this paragraph, except violations of subdivision one of section three hundred seventy-five of this chapter or of subdivision one of section four hundred one of this chapter and similar violations under any local law, ordinance or regulation committed by an employed driver if the offense occurred while operating, in the course of his employment, a vehicle not owned by said driver, whether such three or more violations were repetitions of the same offense or were different offenses.

(v) Cases sustaining the jurisdiction of this Court are:

Application of Gault,87S.CT. 1428(1967);
Giaccio v. Pennsylvania, 382US 399(1966);
Hoyt v. Florida, 368US 57 (1961);
Ferguson v. Georgia, 365US 570 (1961).

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

Does a state statute that denies the right of Due Process in the revccation of a drivers license which is a property right, violate the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

Petitioner's license to operate a motor vehicle was automatically revoked by the Department of Motor Vehicles on September 28, 1972 as the result of three speeding convictions within a period of eighteen months (Vehicle and Traffic Law, section 510, subdivision 2(a) (iv)). On January 2, 1973 petitioner was charged with a misdemeanor for driving a motor vehicle while his license to do so was revoked (Vehicle and Traffic Law, section 511). Petitioner entered a guilty plea on September 19, 1973 resulting in a judgment of conviction. A notice of appeal to the Appellate Term, Ninth and Tenth Judicial District was filed but the appeal was dismissed for lack of prosecution on June 5, 1974.

In the interim, by an Order to Show Cause dated October 9, 1973, petitioner brought on this Article 78 proceeding not only to set aside the revocation but to stay sentence on the prior misdemeanor conviction. By a decision dated December 3, 1973 and judgment entered December 18, 1973 the Supreme Court, County of Suffolk (William L. Underwood, Jr.) dismissed the

petition on the basis that the statute providing for automatic revocation did not abridge due process requirements since petitioner had had an ample opportunity to be heard before a judicial tribunal on each of the three speeding convictions. The Appellate Division, Second Judicial Department unanimously affirmed that dismissal by an order dated November 29, 1974. On December 26, 1974 petitioner filed a Notice of Appeal to the Court of Appeals of New York State, the appeal was submitted January 9, 1976; and decided February 26, 1976, upholding the constitutionality of section 510 of the Vehicle and Traffic Law and not requiring a hearing prior to revocation of a driver's license. The Memorandum Decision is herein as Appendix A. The Court of Appeals of the State of New York is the highest court in the State of New York.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

If this case had been heard in a federal court, the appellant unquestionably would have had the New York State Vehicle and Traffic Law section 510 declared unconstitutional for not providing for a hearing prior to revocation and affording the appellant his due process protection of the Fourteenth Amendment of the United States Constitution.

cess protection of the Fourteenth Amendment of the United States Constitution.

I

Reasons for Granting the Appeal

The New York Court of Appeals decision is in conflict with this Court's rulings defining the constitutional limits on a state's power to revocate a driver's license, without a prior hearing.

The emerging law requiring a hearing in advance of the revocation of a driver's license stems from the decision of this Court in Bell v. Burson, 402 U.S. 535 (1971). The Court ruled that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment" (p. 539). The required due process, the Court held, consisted of affording the motorist "notice and opportunity for a hearing". Most significantly, this notice and hearing must be afforded "before the termination becomes effective" (p. 542) (emphasis by the Court).

Bell v. Burson has been the progenitor of numerous and divergent lower court decisions involving mandatory suspensions or revocations of driver's licenses under statutes like section 510, subd. 2(a) (iv).

In Reese v. Kassab, 334 F. Supp. 744 (W.D. Pa 1971), a three-Judge panel held unconstitutional a Pennsylvania statute providing, without a prior hearing, for mandatory suspension for 60 days of the driver's license of any motorist who had accumulated 11 points. The Court held that due process required "notice" and "an administrative hearing" at which there was an "opportunity to rectify error".

The New York State Court of Appeals in appellant's case used a contrary holding in another point system case of Stauffer v. Weedlun, 188 Neb. 105, 195 N.W. 2d 218 (1972), appeal dismissed, 409 U.S. 972 (1973). The Nebraska court's decision was that the U.S. Supreme Court in Jennings v. Mahoney, 404 U.S. 25 (1971), had held that due process was not violated where the motorist obtained a court stay of the license revocation and a court hearing prior to the effectiveness of the revocation. The stay procedure described by the Supreme Court in Jennings also had occurred in Stauffer v. Weedlun .

That the Supreme Court's dismissal of the appeal in Stauffer v. Weedlun was based upon the Jennings ground that the constitutional issue was not presented in

view of the Court stay, and not upon agreement with the Nebraska Court's holding was later demonstrated by Warner v. Trombetta, 348 F. Supp. 1060 (N.D. Pa. 1972), aff'd, 410 U.S. 919 (1973). The three-Judge court in Warner held unconstitutional a Pennsylvania statute which did not provide for a hearing in advance of a mandatory license revocation.by the Secretary of the Department of Transportation upon conviction for leaving the scene of an accident. The Supreme Court's affirmance, in a case in which the ground for revocation can be regarded as even more egregious than the three speeding convictions in 18 months involved in this case, reflects the Supreme Court's latest views.

Another case in point is Cicchetti v. Lucey, 377 F. Supp. 215 (D. Mass. 1974), where the Court held unconstitutional a Massachusetts statute calling for mandatory suspension, without prior hearing, of the license of a driver who, without good cause, failed to appear in traffic court.

In Holland v. Parker, 354 F. Supp 196 (SD 1973) rejected the contention set forth Stauffer v. Weedlun, supra, that due process requirements had been satisfied by a post revocation stay. In Holland v. Parker the court

held that South Dakota's implied consent statute was unconstitutional for not providing for a hearing prior to the revocation of a driver's license for failure of the motorist to take a chemical analysis of his blood. Any driver whose license was revoked or suspended could upon application by the way of petition within 30 days file for a hearing in the circuit court, the license to drive in the interim would remain cancelled or revoked. The court reasoned that if a driver's license is to be taken away from the licesee, procedural due process requirement has to be meet by a hearing prior to the taking. Rejecting the contention that South Dakota's implied consent statue met the requirements of an"emergency situation" under Bell v. Burson, the court declared that summary action to remove from the roads the recalcitrant, potentially drunk driver since the basis for revocation without prior hearing was not intoxication, but refusal to take the test.

The "Emergency Situations" exceptions to Bell v. Burson does not apply to Vehicle and Traffic Law Section 510, Subd. 2 (a) (iv). The courts in Reese v. Kassab and Warner v. Trombetta and Holland v. Parker, supra, did not discuss the Supreme Court's

recognition in Bell v. Burson, supra, that in "emergency situations," due process may not require a hearing in advance of governmental interference with substantial interest. Yet, it is implicit in those decisions that the "emergency situations" exception did not apply to the license revocations there involved. The Supreme Court's affirmance of Warner v. Trombetta, is another implicit decision on that point.

CONCLUSION

By the long line of cases on point it becomes apparent that proper adjudication of this ever increasing issue has only been achieved in a federal jurisdiction. It becomes a paramount problem when the states refuse to follow the edict of the Supreme Court of the United States, for these reasons the Supreme Court should decree a once and for all ruling on the issues brought on this appeal.

Respectfully submitted,

Mark H. Horodner
Appellant, Pro se
131 Wynsum Ave.
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(516) 466-4123

May 19, 1976

In the New York State
Court of Appeals State
of New York

Mark H. Horodner,
Appellant,
-against-
Louis J. Lefkowitz Att.
General, State of New York
AND
Arnold R. Fisher Comm. of
Department of Motor Vehicles
State of New York
AND
Hon. Herny Wenzell III
District Attorney of Suffolk
County State of New York
Respondents.

SUFFOLK COUNTY
INDEX No.13789-73
NOTICE OF APPEAL
from State Court,-
Civil Case

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

I

Notice is hereby given that Mark H. Horodner, the appellant above named,hereby appeals to the Supreme Court of the United States from the final judgement of the New York State Court of Appeals affirming the order of the Appellate Division, declaring section 510 and 511 of the Vehicle and Traffic Law to be constitutional. ENTERED in this action on the 26th. day of February 1976.

This appeal is taken pursuant to 28 U.S.C.A. § 1257 (2).

II

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all Records, Briefs, opinions and any other material that caused said court to formulate it's opinion.

III

The following questions are presented by this appeal.

Is section 510 and 511 of the Vehicle and Traffic Law of the State of New York constitutional for failing to provide for a hearing prior to revocation of a driver's license when this failure deprives appellant of the due process requirement of the Fourteenth Amendment of the United States Constitution.

DATED: April 24, 1976

Mark H. Horodner
131 Wynsum Ave.
Merrick, N.Y. 11566
(516) 466-4123

cc. All Respondents

Supreme Court of the United States

New York Court of Appeals

Clerk of the Supreme Court of Suffolk County

In the Matter of MARK H. HORODNER, Appellant, v ARNOLD R. FISHER, as Commissioner of Motor Vehicles, et al.,

Respondents.

Submitted January 9, 1976; decided February 26, 1976

COOKE, J. Within an 18-month period, petitioner Mark Horodner was thrice convicted of speeding, which convictions served as the basis for the September 28,1972 revocation of his driver's license. On January 2, 1973, Horodner was charged with a misdemeanor for driving while his license was revoked. His guilty plea, entered in the District Court of Suffolk County on September 19, 1973, resulted in a judgment of conviction, the appeal from which was dismissed on June 5, 1974 for lack of prosecution. Meanwhile, by an order to show cause dated October 9, 1973, petitioner brought on this article 78 proceeding to set aside the revocation as well as to stay sentence on the misdemeanor conviction.

Petitioner, by this proceeding, does not seek to collaterally attack his District Court conviction. Rather, petitioner seeks review of the revocation itself, alleging that prior to such revocation the due process requirements of notice and hearing

must be met. In order for this court to properly reach the constitutional issue, it is necessary that we convert this Article 78 proceeding into a declaratory judgment action (see Matter of Merced v Fisher, 38 NY2d 557) and, once having effected the conversion, we thus proceed.*

Section 510 of the Vehicle and Traffic Law provides, inter alia, for the mandatory revocation of a driver's license where the holder has been convicted of three speeding violations within a period of 18 months (Vehicle and Traffic Law, 510, subd 2, par a, cl (iv)). While New York courts have considered the constitutionality of section 510 in years past (Matter of Barton v Hults, 23 Misc 2d 861; Matter of Cadieux v Macduff, 1 AD 2d 360, app dsmd 1 NY2d 827), they have not done so in light of the United States Supreme Court decision in Bell v Burson (402 US 535). The earlier cases, relying on the "right-privilege" distinction (People v Rosenheimer, 209 NY 115, 121),

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* We wish to express our gratitude to the Association of the Bar of the City of New York for Submitting its excellent amicus curiae brief.

viewed the possession of a driver's license as a priviledge which could be revoked in the absence of the due process procedures (Matter of Barton v Hults, supra, pp 862-863; People v Rosenheimer, supra).

The Supreme Court in Bell v Burson, in reasserting the demise of the distinction, stated that (p 539) "(o)nce licenses are issued *** their continued possession may become essential in the pursuit of a livelihood. Suspension of the issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. Sniadach v Family Finance Corp., 395 U.S. 337 (1969); Goldberg v Kelly, 397 U.S. 254 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privlege' ". Bell held Georgia's Motor Vehicle Safety Responsibility Act unconstitutional. Said act provided that the registration and

driver's license of an uninsured motorist involved in an accident could be suspended for failure to post security to cover the amount of damages claimed by the injured parties in the accident without prior hearing on fault or liability. While the Georgia statue contemplated a hearing, it was only to determine whether the individual or his vehicle had been involved in an accident and whether he was "financially responsible". The court indicated that, except in emergency situations, when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective" and that, under Georgia's statutory scheme, the State "must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against * * * (an individual) as a result of the accident". (402 U.S. 535, 542, supra).

Early on, it must be noted that while the purpose of a financial responsibility statue such as that in Bell is to obtain security from which to pay a possible judgment against the licensee

resulting from an accident, the purpose of the statue such as section 510 of the Vehicle and Traffic Law is to promote traffic safety. Other jurisdictions have had statutes akin to 510 challenged on due process grounds and while there has been a similarity in the questios raised, there has been a divergence in result (compare Stauffer v Weedlun, 188 Neb 105, app dsmd 409 U.S. 972; with Abraham v State of Florida, 301 So 2d 11, app dsmd 420 U.S. 941; with Reese v Kassab, 334 F Supp 744, cert den 414 U.S. 1002; see, generally, Necessity of Notice and Hearing Before Revocation or Suspension of Motor Vehicle Driver's License, Ann., 60 ALR3d 361).

In Stauffer v Weedlun (supra), the Court held that a statute which provided for mandatory revocation of a driver's license upon accumulation of 12 or more traffic violation points satisfied due process requirements in the absence of statutory provision for notice and hearing. In Stauffer, reliance was placed upon the Jennings v Mahoney (404 U.S. 25) resolution - that by staying the license suspension pending a court-ordered hearing, the appellants had, in fact, been afforded

due process. Based upon that finding, the United States Supreme Court in Jennings, did not reach the question of the constitutionality of the statute itself. Comparing the circumstances in Stauffer to those in Jennings, the Nebraska court likewise found that due process had been afforded. The Stauffer court placed its holding upon the additional ground of the emergency exception, referred to, but not applied, in Bell (402 U.S. at p 542). The policy, purpose and procedures behind mandatory and automatic revocation for traffic violations under the point system differed sufficiently from that for revocation under the financial responsibility act so that the former could be viewed as a legislative attempt to deal with an emergency situation, while the latter could not. This latter type statute is an attempt to protect the public against judgment-proof drivers but, without a hearing as to fault, carries with it the possibility of wrongfully depriving the motorist of a valuable entitlement. In Bell, such State interest was not deemed sufficient to outweigh an individual's right to a due process hearing. The former type of statute, by its very nature, is different, in that as

points are accumulated the driver is informed and aware of the consequences thereof. Each conviction, for which points are given, has its due process elements. The policy served by such a statute is to help assure that recidivist traffic offenders are prohibited from traveling the highways. "The compelling public interest in removing from the highways those drivers whose records demonstrate unsafe driving habits outweighs the need for notice and hearing prior to the order to protect the individual against mistake" (Stauffer v Weedlun, 188 Neb 105, 114, supra; see State v Sinner, 207 NW2d 495 (ND)). Significantly, the appeal in Stauffer was dismissed by the United States Supreme Court "for want of substantial federal question" (409 U.S.972).

Section 510 of the Vehicle and Traffic Law bears greater similarity in provision and purpose to the statute scrutinized in Stauffer than to that in Bell and, accordingly, a similar rationale may be adopted.

A New York driver, as petitioner herein having been convicted for speeding on three occasions within a period of 18 months, has been entitled on each conviction to notice and hearing. Notably, subdivision 7 of section 510 provides that

revocation is not to be effected if the revoking official is satisfied that the Magistrate who pronounced the judgment of conviction failed to comply with subdivision 1 of section 1807 of the Vehicle and Traffic Law. Said latter section requires that a warning be given to the motorist as to effect of a conviction upon revocation or suspension of his driver's license.

On notice of revocation, petitioner may seek a stay and, by way of an article 78 proceeding (CPLR 7803, subd 3), challenge the action taken. Subdivision 7 of section 510 provides that such act of revocation shall be deemed administrative for purposes of judicial review. On review, petitioner may challenge the action on grounds such as: (1) misidentification of the person subject to one or more of the convictions; (2) reversal or dismissal on appeal of one or more of the convictions; and (3) miscalculation of the time within which the convictions occurred.

This court, as did the Nebraska Supreme Court in Stauffer, takes the position that what we are presented with is an emergency situation. We recognize that the Legislature intended by such revocation to remove from the roads of our State drivers

who, by their conduct, have been found to have repeatedly placed their own personal interests above those of the rest of the citizenry. In such situation the due process protection of an article 78 proceeding suffices.

Similar due process questions raised in the Matter of Sanford v Rockerfeller (35 NY2d 547) and Matter of Tappis v New York State Racing & Wagering Bd., Harness Racing Div. (36 NY2d 862) were resolved in this manner.

We therefore affirm the order of the Appellate Division, declaring section 510 of the Vehicle and Traffic Law to be constitutional.

Order affirmed, without costs.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER and FUCHSBERG concur.

Order affirmed.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judical Department, held in Kings County on November 29, 1974.

HON. FRANK A. GULOTTA, Presiding Justice
HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM
HON. MARCUS G. CHRIST

In the Matter of
Mark H. Horodner,

Appellant,

V

Arnold R. Fisher, as Commissioner of the Department of Motor Vehicles, et al.,

Respondents.

Order on Appeal from Judgment-Civil Action or Proceeding

In the above entitled cause, the above named Mark H. Horodnor, petitioner, having appealed to this court from a judgement of the Supreme Court, Suffolk County, entered December 18, 1973; and the said appeal having been submitted by Mark H. Horodner, appellant in person and submitted by Ronald E. Lipetz, Henry G. Wenzell III, District Attorney, of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is ORDERED that the judgment appealed from is hereby unanimously affirmed, without costs.

Enter:

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY SPECIAL TERM PART I

MARK H. HORODNER,
Petitioner

VS.

VINCENT L. TOFANY as COMM. of the Dept. of Motor Vehicles of New York
AND
HON. GEORGE J. ASPLAND, District Attorney of Suffolk County
Respondents.

BY UNDERWOOD Jr. J.S.C.

Dated: Dec. 3, 1973

Index No. 73-13789

Motion No. 7477

PUBLISH

RONALD LIPETZ, ESQ.	MARK H. HORODNER
DISTRICT ATT'S OFFICE	Pro Se
DISTRICT ATT. OF SUFFOLK	131 WYNSUM AVE.
COUNTY, RIVERHEAD, N.Y.	MERRICK, N.Y.

This is an Article 78 procedding, brought in the nature of prohibition, against the Commissioner of the Department of Motor Vehicles of the State of New York and the District Attorney of Suffolk County, to set aside a revocation of petitioner's license to operate a motor vehicle.

Petitioner contends that the sections of the Vehicle and Traffic Law pusuant to which he was charged and convicted (Sec. 511), and his license revoked (Sec. 510),

are unconstitutional.

Petitioner, pursuant to a misdemeanor information filed in the District Court, Suffolk County, First District, was charged with operating a motor vehicle while his license to do so had been revoked, in violation of Section 511 of the Vehicle and Traffic Law. Thereafter, on September 19, 1973, petitioner entered a plea of guilty to that charge, and was sentenced to a term of imprisonment of 15 days in the Suffolk County Jail.

The initial revocation of the petitioner's license occurred on September 28, 1972, stemming from three speeding convictions within an 18 month period.

Section 510 of the Vehicle and Traffic Law mandates the revocation of a license to operate a motor vehicle upon the occurrence of certain specified and serious offenses enumerated therein, which include three speeding violations committed within a period of 18 months. The thrust of petitioer's argument is that the section is unconstitutional because it authorizes mandatory revocation of a license to operate a motor vehicle upon the public highways of this state, without requiring a hearing on that specific issue before the Depart-

ment of Motor Vehicles. In making this argument, petitioner relies heavily upon (Bell v Busron 402 U.S. 535), which holds in effect, that once licenses are issued, they cannot be taken away without due process of law.

Petitioner's contention, although highly imaginative, is devoid of merit. Satisfaction of the requirements of due process, does not mandate a confirmation or review by means of a seperate hearing before the Commissioner of the Department of Motor Vehicles, after a defendant has already been afforded due process of law by the judicial tribunal in which he has been charged and convicted, leading to a mandatory and summary revocation of his drivers license. Petitioner makes no claim that he was deprived of due process of law in the Court in which he had been charged and convicted of the violations resulting in the mandatory revocation of his license.

This Court holds that Section 510 of the Vehicle and Traffic Law, pursuant to which petitioner's license was revoked, and Section 511 which prohibits operating a motor vehicle by a person while his license is suspended or revoked, are constitutional, and represent a reasonable and

necessary exercise by the state of its police powers, and also carry with them the requisite elements of legal due process. (Matter of Barton v Hults, 23 Misc. 2d 861, Matter of Nelson, 4 A.D. 2d 596, 598, Matter of Drassin v Kelly, 6 A.D. 2d 453, 455).

The petition is dismissed.

Settle judgment.

William L. Underwood, Jr.
J.S.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1699

MARK H. HORODNER,

Appellant,

against

ARNOLD R. FISHER, as Commissioner of the New York State Department of Motor Vehicles, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York and HENRY F. O'BRIEN, as District Attorney of Suffolk County, New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1699

MARK H. HORODNER,

Appellant,

against

ARNOLD R. FISHER, as Commissioner of the New York State Department of Motor Vehicles, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York and HENRY F. O'BRIEN, as District Attorney of Suffolk County, New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellees Arnold R. Fisher, Commissioner of Motor Vehicles of the State of New York and Louis J. Lefkowitz, Attorney General of the State of New York, respectfully move the Court pursuant to Rule 16 to dismiss this appeal on the ground that appellant has failed to raise a substantial federal question.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 38 N Y 2d 680, 345 N.E. 2d 571 and 382 N.Y.S. 2d 28. It is reproduced as Appendix A to the

jurisdictional statement. The decision of the Appellate Division of the Supreme Court, Second Department, was rendered without opinion. It is reported at 46 A D 2d 887 and 363 N.Y.S. 2d 315 and is reproduced as Appendix B to the jurisdictional statement. The opinion of the Supreme Court, Suffolk County is unreported. It is reproduced as Appendix C to the jurisdictional statement.

Jurisdiction

The opinion of the Court of Appeals was rendered on February 26, 1976. Notice of Appeal was filed on May 11, 1976. Appellant invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2).

Question Presented

Whether New York Vehicle & Traffic Law § 510(2)(a)(iv), requiring the Commissioner of Motor Vehicles to summarily revoke without further hearing the license of a driver convicted of certain offenses, violates the due process clause of the Fourteenth Amendment to the Constitution?

Statute Involved

New York Vehicle & Traffic Law § 510 provides in pertinent part:

> 2. Mandatory revocations and suspensions. a. Mandatory revocations. Such licenses shall be revoked and such certificates of registration may also be revoked where the holder is convicted:
>
> • • •
>
> (iv) of a third or subsequent violation, committed within a period of eighteen months, any provision of

> section eleven hundred eighty of this chapter, any ordinance or regulation limiting the speed of motor vehicles and motorcycles or any provision constituted a misdemeanor by this chapter, not included in subparagraphs (i) or (iii) of this paragraph, except violations of subdivision one of section three hundred seventy-five of this chapter or of subdivision one of section four hundred one of this chapter and similar violations under any local law, ordinance or regulation committed by an employed driver if the offense occurred while operating, in the course of his employment, a vehicle not owned by said driver, whether such three or more violations were repetitious of the same offense or were different offenses.

McKinney's, New York Consolidated Laws, Book 62A, Part I, p. 507.

Statement of the Case

Appellant's driver's license was summarily revoked on September 28, 1973 by the Commissioner of Motor Vehicles pursuant to N.Y. Vehicle & Traffic Law § 510(2)(a)(iv) upon the receipt of certificates of appellant's conviction of three speeding violations committed within a period of eighteen months.

Appellant never suggested that he was not guilty of the three speeding offenses or of the misdemeanor of operating while unlicensed of which he had also been subsequently convicted upon his plea of guilty (A 1).*

Instead, prior to being sentenced on the unlicensed operation conviction, appellant sought a judgment pursuant to N.Y. CPLR Article 78 setting aside both the license revocation and the plea of guilty upon the grounds that the

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* Numbers in parentheses preceded by letters refer to the appendices to appellant's jurisdictional statement.

failure of the Commissioner of Motor Vehicles afford him a hearing prior to revoking his license denied him due process under the Fourteenth Amendment and that the unlicensed operation conviction predicated upon the revocation was similarly tainted (C 1-2).*

Special Term dismissed petitioner's claim holding both sections 510 and 511** to be reasonable exercises of the State's police power and to comport with due process by virtue of the prior judicial hearings afforded to petitioner (C 3-4).

The Appellate Division affirmed without opinion (B 1).

A further appeal on constitutional grounds was taken to the New York Court of Appeals which unanimously upheld the statute.

The Court held that requirements of due process were satisfied by the opportunity to defend against the traffic charges (A 7); a right that is further enhanced by the provisions of N.Y. Vehicle & Traffic Law § 1807 whereby a motorist is warned that conviction of a traffic offense may result in the suspension or revocation of his license coupled with the requirement of N.Y. Vehicle & Traffic Law § 510(7) that summary revocation may not be had unless the Commissioner is satisfied that § 1807 had been complied with. In addition, the Court noted the availability of judicial review to correct misidentification of the driver; miscalculation of the time in which the traffic offenses were

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* Appellant was unsuccessful in obtaining federal review of this claim and enjoining another similar prosecution in *Horodner* v. *Cahn*, 360 F. Supp. 602, 604 (E.D.N.Y. 1973) case being dismissed on the ground that federal interference in a pending state prosecution was barred by *Younger* v. *Harris*, 401 U.S. 37 (1971).

** The constitutionality of the unlicensed operation conviction, N.Y. Vehicle & Traffic Law § 511 is not an issue on this appeal, it not having been raised in the jurisdictional statement, S. Ct. Rules, Rule 15(c).

committed or to correct the record where a conviction employed as a predicate for revocation has been reversed on appeal (A 8).

In upholding the statute the Court of Appeals noted the similarity of the New York law to other state statutes which have been summarily upheld by this Court against constitutional challenges virtually identical to that in the instant case (A 5-8).

ARGUMENT

Appellant has failed to raise a substantial federal question requiring plenary consideration by this Court.

A state statute providing for summary revocation of a a driver's license for repeated traffic offenses comports with the requirements of due process of law if, as in the instant case, the driver has an opportunity for judicial scrutiny of the underlying facts, *Stauffer* v. *Weedlum*, 188 Neb. 105, 195 N.W. 2d 218 (1972) app. dsmd. 409 U.S. 972 (1973); *Abraham* v. *State of Florida*, 301 So. 2d 11 (Fla.) app. dsmd. 420 U.S. 941 (1974). See also *Jennings* v. *Mahoney*, 404 U.S. 25 (1971).

The similarity of the *Stauffer* and *Abraham* cases to the case at bar gives them full precedential value, *Hicks* v. *Miranda*, 422 U.S. 332, 343-344, 345, n. 14 (1975).

In attempting to demonstrate the substantiality of his claim, appellant mistakenly relies upon *Bell* v. *Burson*, 402 U.S. 535 (1971) as authority for the necessity of a pre-revocation hearing. Unlike the instant case where the statute at bar is designed to promote traffic safety (A 4-5), the only purpose of the financial security statute in *Bell* "is to obtain security from which to pay any judgments against the licensee resulting from [an] accident," 402 U.S. at 540. See also: *Perez* v. *Campbell*, 402 U.S. 637,

646-648 (1971). *Bell* involved the mandatory suspension of the license of an uninsured motorist who failed to post security when a suit for damages was brought but *before* the driver's liability was established. A complete adjudication was not deemed necessary, since this could come only after a trial upon the merits. The Court merely held that

> "procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee." 402 U.S. at 540.

In the instant case, there has been a full adjudication of the merits of the underlying offenses by virtue of the judgments of conviction. Appellant has already had the "notice and opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective", required by due process (emphasis in original), *id.* at 542.

Appellant stands duly convicted of traffic offenses, whereas in the *Bell* case the motorist's liability had not been established. Thus, this case is closer to *Perez* v. *Campbell, supra,* where a state statute which suspended the license of a motorist against whom had been entered an unsatisfied judgment was voided, but only because of its conflict with the Federal Bankruptcy Act. Patently, both the purpose of the statute construed in *Bell* and the underlying rationale of that decision are totally inapplicable to the case at bar.

Other authorities relied upon by appellant are equally inapposite:

The apparent lack of administrative or judicial machinery to correct clerical errors appearing in the records of the convicting courts was a major factor in the cases of *Reese* v. *Kassab,* 334 F. Supp. 744, 747 (W.D. Pa. 1971)

and *Warner* v. *Trombetta,* 348 F. Supp. 1068, 1071 (N.D. Pa. 1972) affd. 410 U.S. 919 (1973) which held unconstitutional Pennsylvania statutes which required the revocation of the licenses of those drivers who respectively, were habitual traffic offenders or who left the scene of an accident. Moreover, there is no evidence that these statutes contained safeguards similar to Vehicle & Traffic Law § 1807(1) which might have warned those motorists of the possible consequences of the guilty pleas entered in those cases, 334 F. Supp. at 745-746; 348 F. Supp. at 1068, 1070. Similarly, a case such as *Cicchetti* v. *Lucey,* 377 F. Supp. 215 (D. Mass. 1974) involving defective court records would be remediable under existing procedures. The situations that occurred in those cases simply would not occur under the New York statute.

The right of the states to enact laws to promote traffic safety and to attempt to stem the annual slaughter on the public roads has been recognized by this Court, *Perez* v. *Campbell, supra,* 402 U.S. at 650-652, 657 (1971). Even cases relied upon by appellees concede this important state interest, *Reese* v. *Kassab, supra,* 334 F. Supp. at 747, 752; *Warren* v. *Trombetta, supra,* 348 F. Supp. at 1071. See also: *Brockway* v. *Tofany,* 319 F. Supp. 811, 815, 817 (S.D.N.Y. 1970).

New York Vehicle & Traffic Law § 510(2)(a)(iv) advances this important state interest by removing from the highways those who habitually flout the traffic laws. As we have demonstrated herein, the means by which this is accomplished clearly satisfies the requirements of due process.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Dated: New York, New York, June 21, 1976.

Respectfully submitted,

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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1975

No. 75-1699

Mark H. Horodner,

Appellant,

vs.

Arnold R. Fisher as Commissioner of the New York State Department of Motor Vehicles

Louis J. Lefkowitz as Attorney General of the State of New York

Hon. Henry G. Wenzel III as District Attorney of the County of Suffolk,

Appellees.

On Appeal From the Court of Appeals

Of the State of New York

Motion to Dismiss and Brief in Support of Motion to Dismiss

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Motion to Dismiss

Appellee, the District Attorney of Suffolk County, pursuant to Rule 16 of the Revised Rules

of the Supreme Court of the United States, moves for an Order of this Court dismissing the above-entitled appeal for the reason that it does not present a substantial federal question.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Suffolk County, upholding the constitutional validity of Section 510 of New York's Vehicle and Traffic Law is not officially reported, but same is reprinted in Appendix C of Appellant's Brief.

The Order of the Supreme Court of the State of New York, Appellate Division, Second Department, unanimously affirming the determination of the lower court, without opinion, is officially reported at 46 A.D.2d 845 (1974).

The opinion of the Court of Appeals of the State of New York, unanimously affirming the Order of the intermediate appellate court is officially reported at 38 N.Y.2d 680 (1976).

JURISDICTION

The jurisdiction of this Court is invoked under

28 U. S. C., section 1257, subdivision 2. Appellant claims he has been deprived of due process under the Fourteenth Amendment of the United States Constitution.

QUESTION PRESENTED

Does Section 510 of the New York Vehicle and Traffic Law violate the due process clause of the Fourteenth Amendment of the United States Constitution?

STATUTES INVOLVED

New York Vehicle and Traffic Law, Section 510, subdivision 2(a)(iv) provides:

> "Mandatory revocations and suspensions. a. Mandatory revocations. Such licenses shall be revoked and such certificates of registration may also be revoked where the holder is convicted....:
>
> of a third or subsequent violation, commited within a period of eighteen months, any provision of section eleven hundred eighty of this chapter, any ordinance or regulation limiting the speed of motor vehicles and motorcycles or any provision constituted a misdemeanor

by this chapter, not included in subparagraphs (i) or (iii) of this paragraph, except violations of subdivision one of section three hundred seventy-five of this chapter or of subdivision one of section four hundred one of this chapter and similar violations under any local law, ordinance or regulation committed by an employed driver if the offense occurred while operating, in the course of his employment, a vehicle not owned by said driver, whether such three or more violations were repetitions of the same offense or were different offenses...."

New York Vehicle and Traffic Law, Section 510, subdivision 7 provides, in pertinent part, as follows:

"....Revocation or suspension hereunder shall be deemed an administrative act reviewable by the supreme court as such. Notice of revocation or suspension, as well as any required notice of hearing, where the holder is not present, may be given by mailing the same in writing to him at the address contained in his license or certificate of registration, as the case may be. Attendance of witnesses may be compelled by subpeona...."

New York Vehicle and Traffic Law, Section 1807, subdivision 1 provides as follows:

"The local criminal court, upon the arraignment in this state of a resident of this state charged with a violation of the vehicle and traffic law,

or other law or ordinance relating to the operation of motor vehicles or motorcycles, and before accepting a plea,or in the case of such a defendant who has previously pleaded not guilty, as provided in section eighteen hundred six of this chapter, and who wishes to change or withdraw such plea, must inform the defendant at the time of his arraignment or appearance for trial in substance as follows:

A plea of guilty to this charge is equivalent to a conviction after trial. If you are convicted, not only will you be liable to a penalty, but in addition your license to drive a motor vehicle or motorcycle, and your certificate of registration, if any, are subject to suspension and revocation as prescribed by law.

The giving of the foregoing instructions by means of a statement printed in bold red type in a size equal to at least twelve point type, upon a summons or ticket issued to a person charged with any such offense shall constitute compliance with the requirements of this section...."

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States
Amendment XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On September 28, 1972, Appellant's license to operate a motor vehicle was revoked without a hearing by the Commissioner of Motor Vehicles because of three speeding convictions within an eighteen month period [Vehicle and Traffic Law, Section 510, subdivision 2(a)(iv)].

Thereafter, on January 2, 1973, he was charged in the District Court of Suffolk County (New York) with operating a motor vehicle while his license was revoked (Vehicle and Traffic Law, Section 511). Appellant pleaded guilty to this charge on September 19, 1973 and sentencing was adjourned to a subsequent date.[1]

Meanwhile, on October 9, 1973, Appellant moved by way of Order to Show Cause in the Supreme Court of Suffolk County for a judgment, pursuant to CPLR Article 78, setting aside the revocation of his license on the ground that the Commisioner of Motor Vehicles did not

---

1. Appellant was sentenced on January 11, 1974 to fifteen days in jail. He, thereafter, appealed his conviction to the Appellate Term of the Supreme Court, Second Department. However, on June 5, 1974, the Appellate Term dismissed the appeal for lack of prosecution. No application was ever made by Appellant to have the appeal restored to the calendar.

afford him a pre-revocation hearing. He argued that the summary revocation of his license denied him due process of law, and, therefore, his conviction for operating a motor vehicle while license revoked was tainted.[2]

On December 3, 1973, the Supreme Court of Suffolk County determined that Vehicle and Traffic Law, Section 510, subdivision 2(a)(iv) represented a reasonable and necessary exercise by the State of its police powers and that it contained all the requisite elements of constitutional due process.

On November 29, 1974, the Supreme Court of the State of New York, Appellate Division, Second Department, unanimously affirmed the determination of the lower court, without opinion.

On February 26, 1976, the Court of Appeals of the State of New York unanimously affirmed the order of the intermediate appellate court in an opinion by Honorable Lawrence H. Cooke.

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2. There was never any suggestion by Appellant in the Courts below that he was innocent of the three underlying speeding convictions.

POINT ONE

VEHICLE AND TRAFFIC LAW, SECTION 510, SUBDIVISION 2(a)(iv) FULLY COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS.

In Bell v. Burson, 402 U. S. 535 (1971), the Court ruled that drivers' licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. The required due process, the Court held, consisted of affording the motorist notice and opportunity for a hearing. Most significantly, this notice and hearing must be afforded before the termination or revocation becomes effective.

In the case at bar, Appellant was thrice convicted of speeding within an eighteen month period. Prior to the entry of each judgment of conviction, he was given notice of the charges and an opportunity to be heard thereon. Notably, Appellant makes no claim here that he was deprived of due process in the judicial tribunals which convicted him of the three underlying speeding charges.

In addition, Vehicle and Traffic Law, Section 510, subdivision 7 provides that a license revocation is not to be effected if the revoking official is

satisfied that the judge who pronounced the judgment of conviction failed to comply with the requirements of Vehicle and Traffic Law, Section 1807, subdivision 1. Said latter section mandates that a warning be given to a motorist as to the effect of a conviction on the revocation or suspension of his driver's license.

Moreover, upon receiving a notice of revocation, a motorist may seek a stay thereof and, by way of an Article 78 proceeding (CPLR 7803, subdivision 3), challenge the action taken. Vehicle and Traffic Law, Section 510, subdivision 7 provides that such act of revocation shall be deemed administrative for the purpose of judicial review. On review, a motorist may challenge the action on grounds such as: (1) misidentification of the person subject to one or more of the convictions; (2) reversal or dismissal on appeal of one or more of the convictions; and (3) miscalculation of the time within which the convictions occurred.

At no time in the Courts below did Appellant challenge the revocation of his license on any of the above enumerated grounds. Nor did he ever claim that

the action of the revoking official was arbitray or capricious.

Based upon the foregoing, it is clear that Vehicle and Traffic Law, Section 510, subdivision 2(a)(iv) fully comports with the requirements of constitutional due process [Stauffer v. Weedlun, 188 Neb. 105 (1972), app. dsmd. 409 U. S. 972 (1972); Horodner v. Fisher, 38 N.Y.2d 680, 684-685 (1976)].

Furthermore, no useful purpose would be served by requiring a separate, pre-revocation hearing before the Commissioner of Motor Vehicles. Under the statute, the Commissioner's function in these point-revocation proceedings is purely ministerial [Vehicle and Traffic Law, Section 510, subdivision 2(a)(iv)]. Moreover, Appellant has already been afforded a full evidentiary hearing in the Tribunal of conviction.

Perhaps no clearer exposition of the law can be found than that which exists in Stauffer v. Weedlun, supra., wherein the Supreme Court of Nebraska said:

> "We think that in a very real sense the essential facts have been determined in the judicial proceedings in connection with each conviction. In a very real sense the Director (of Motor Vehicles) acts only ministerially. The result--the revocation--flows from the operation of the statute upon the already judicially determined facts, that is, the series of convictions of traffic offenses. Of these the

> motorist already has knowledge. Of their effect point-wise he is charged by law with knowledge just as with any other case of knowledge of the law. These circumstances do, in our opinion, make the procedures applicable to revocation of a driver's license for an accumulation of points for traffic offense conviction clearly distinguishable from revocation under the financial responsibility law as in Bell v. Burson, supra. The financial responsibility statutes in effect create without any hearing a presumption of fault. This, if we understand the footing of Bell v. Burson, supra, is their constitutional deficiency. Such a situation does not exist in the case here involved. We hold that under the statutory scheme of Nebraska no notice and hearing were required before the issuance of the order of revocation...
>
> ....The compelling public interest in removing from the highways those drivers whose records demonstrate unsafe driving habits outweighs the need for notice and hearing prior to the order to protect the individual against mistake. In this connection the matter must be viewed not as an isolated case but in the collective aspect, that is, the removal of many such drivers from the highways."(188 Neb. 105, 112, 114)

Significantly, the appeal in Stauffer was dismissed by this Court "for want of (a) substantial federal question." This summary disposition was, of course, binding on the New York Court of Appeals. See Hicks v. Miranda, ____U. S.____,45 L. Ed. 2d 223, 236 (1975).

CONCLUSION

NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED BY THIS APPEAL. ACCORDINGLY, THE DISTRICT ATTORNEY'S MOTION TO DISMISS SHOULD BE GRANTED.

DATED: Riverhead, New York
June 25, 1976

Respectfully submitted,

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